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CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Commissioner of Social Security
P.O. Box 17703
Baltimore, MD 21235-7703

RE: Proposed Regulations
Administrative Review Process
For Adjudicating Initial Disability
Claims 70 Fed Register 43590 et seq.

Dear Commissioner,

Your proposed regulations are wrong minded.

While no announcement has been made, you are proposing to re-fight a lawyer ethics battle made years ago when the Rules for Representatives were proposed. Proposed Rule 404.1572(c) contains the offensive phrase "including evidence that you consider to be unfavorable to your claim." Not only does this propose to refight this battle, it does not recognize a distinction between "Fact" evidence (treatment records) and "opinion" evidence (questionnaires sent to Doctors et al. by Representatives). In addition, Workers Compensation records deserve their own category, as they were generated in a different and adversarial setting, for a different purpose. The proposed rule, as written, invades the work product doctrine and also violates state statutory law as well as ethics rules, for preserving confidences and secrets of

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clients.

Our obligations as Representatives should not extend beyond submitting fact evidence, or informing SSA where it could be obtained, i.e., who are the treating sources. This is a BIG DEAL.

Section 404.1512(d) should be amended to say that you will order medical records from the alleged onset of disability to the present, or from one year before the alleged onset of disability to the present. Currently, your regulation only requires ordering records for one year prior to the application for benefits. DDS should be routinely required to go after the more complete longitudinal record in order to correctly and as completely as possible, have the best record obtainable for factual analysis and decision making.

Proposed Rule 404.1513(c) proposes language for RFC findings. This rule is inadequate to the task. At the last NOSSCR Conference, retired ALJ Ralph Wilborn noted that when he was reviewing files for a possible On The Record decision, he discovered that SSA never asked claimants what they thought their Mental or Physical RFC to be. It is difficult to undertake any analysis of the consistency or inconsistency of the claims made by the claimant, in light of evidence obtained in the record, when the claimants have never been asked what they think their Mental or Physical RFC to be. Therefore, you should require claimants and/or District Offices and/or DDS to have claimants do a self-assessment on these forms early on as an aid to a consistency analysis. And they should be asked to explain the factual basis for each limitation that they identify. (What a concept!)

Section 404.153 also points up a rather glaring shortcoming into how SSA and DDS develop their own proposed RFCs. Item number 11 of the Mental RFC form illustrates this

shortcoming rather well. That item is:

> "The ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods."

It is my experience that DDS will routinely fill out Mental RFC forms, including item 11, even though the case file reflects NO EFFORT by anyone to document how often mental symptoms occur (frequency) or how long they last (duration) or how bad do they get (severity). Or what causes, exacerbates or relieves these symptoms.

To make matters worse, treatment records rarely, if ever, help here. There will be statements like, e.g.: "patient has been having panic attacks which she finds disturbing." Or "Patient has been having more panic attacks lately" or "Patient has not had as many panic attacks lately." Yeah? Well, how often do they happen? How long do they last? How bad to they get?

Your regulations need to require further work-up. For example, you could/should say:

> Before we will determine your Mental Residual Functional Capacity, we will ask you, your treating sources and others familiar with your condition about episodic or intermittent symptoms, such as, but not limited to:
>
> 1. panic attacks
> 2. crying spells
> 3. anger control problems
> 4. mood swings
> 5. others
>
> We will endeavor to determine how often you have experienced these problems;

how long these problems exist when they occur; how severe these problems have been; as well as your prognosis. We will also investigate what things seem to cause, exacerbate or relieve your symptoms."

It is simply inconsistent with basic intellectual honesty to rate item 11 of the Mental RFC form while maintaining agency ignorance of this information. All of these problems appear with considerable frequency in Disability cases, yet the SSA/DDS adjudicators seem to feel that ignorance is bliss. This strikes me as prima facie evidence of incompetence or bad faith. On this point, in your proposal at p. 43607, third column under proposed 404.1520(e)(2) see the requirements there. How do you propose to meet these requirements by maintaining a state of ignorance? If necessary, a Consultative Examination may help IF the examiner is asked to address frequency, duration, and severity, et al. of symptoms.

Proposed Rule 405.15 contains this language: "experts whom you call, and that the Administrative Law Judge approves, for hearing are not required to be so affiliated." (Emphasis supplied.) If the ALJ expects or desires to deny our claim, why would he "approve" our witness? Are you proposing to legitimatize the suppression of evidence by claimants expert witnesses? If so, admit your nefarious intentions out loud for all to know. The same problem appears at proposed rule 404.350(b) where you say "... the Administrative Law Judge may receive any evidence at the hearing that he or she believes is relevant to your claim." Thus the ALJ can suppress evidence? This is reprehensible. We are building a record for review at hearing. There is no way to know in advance if a Federal Court Judge will later agree or disagree with the ALJ or Representative. A complete record is needed so a Federal Court Judge can decide disputed contentions. Otherwise, the ALJ is intentionally creating error in the record. An ethical no-no.

All evidence which the claimant wants included in the record needs to be there for Federal Court review. The ALJ can explain in his/her decision what has been accepted or rejected and why. Remember, there are NO rules of evidence. Congress abolished them to make it easier for us to put on our case.

Proposed rule 405.605 regarding re-openings has no business being here at all. Re-openings have nothing to do with "Answering the President's Questions" at p 43591. They are simply un-kinder, un-gentler and un-compassionate rules.

Proposed rule 405.383 regarding dismissals also has no business being here at all. Dismissals are often arbitrary and capricious. To help answer the "President's Questions" you should make these dismissals subject to judicial review so people can get a square deal.

Proposed rule 405.373 regarding new and material evidence has no place here. We already have such rules. Less kinder and less gentler and un-compassionate new rules will not help answer the "President's Questions."

Proposed rule 405.315 regarding Notice of Hearing should give us at least 90 days advance notice of hearing. This would go a long way to minimizing late submissions of evidence.

Proposed Rule 405.334 is simply giving license to petty tyranny. ALJs could readily reject a pre-hearing memo as inadequate, and post-pone hearings to harass, vex or annoy a Representative he or she does not like. While the ALJs probably have asked for this, they have their own staff to do the same thing. While inviting Pre-Hearing Memos is understandable, requiring them will just cause problems and unhappiness.

Proposed Rule 405.333 is another problem. What kind of "documents" are you talking

about? The proposal for whatever time frame the ALJ wants is just more petty tyranny. Why do you want to bog us down with these petty collateral issues? They will be, literally, more trouble than they are worth. Pissing contest after pissing contest will result. Are these cases to become adversarial rather than non-adversarial? Once you let ALJs have this kind of power, a more adversarial reality is inevitable.

Proposed Rule 405.331 is prima facie evidence for your incomprehensible thinking. At page 43596 of your proposed regulations, you state: "A consistent policy of closing the record after the issuance of the Administrative Law Judge decision will promote administrative efficiency and timely claims processing." The same mentality appears here. You, DDS and Representatives all know that ordering medical records provides no indication of when they will be received. Days, weeks or months will go by without these being received. Shame on your for trying this! Remember, your ALJs have a strangle hold on subpoenas. Perhaps you should let us issue and enforce these in District Court. Or perhaps you should. Consistently. Repent of this sin and wickedness.

The Social Security Act was not adopted to make life easier or more convenient for federal employees. It is to be liberally construed to achieve its beneficent purposes, to lessen the burden of disability and the problems that follow in its' wake Yet these regulations regarding ALJ authority and time frames are an attempt - and pretty scary too - to create government of the bureaucrats, by the bureaucrats and for the bureaucrats. The government, in this country at least, exists to serve the people. In countries with a more statist tradition, the people exist to serve the government. Pre-war Japan, for example. You are moving in this direction. And it is inconsistent with the beneficent purposes of the Social Security Act. Indeed, it exploits the

problem of Medical Providers time delays at the expense of the claimants, elevating "administrative efficiency and timely claims processing" over accuracy in decision making. And it reveals a bias in favor of limiting evidence. In the statist tradition, the people serve the government. In 1930's, Germany, traditional Germanic respect for Government saw the zenith of its' shortcomings. In this country, Republicans at least, have been the enemies of powerful government and Democrats its' champions. Empowering Judicial Bureaucrats to ram time deadlines down our throats, order us to do memos, et al is NOT getting the government off of people's backs. We are now to be told to dance to the Bureaucrat's tune. They will have more power. They will have the rights, and we will have the duties. We must develop, of necessity, a more Germanic respect for government. Or else. This is rather un-Republican. It is also much less informal, and more adversarial. Late arriving evidence is a problem. Get used to it, and quit yer bellyaching. Whatever happened to kinder and gentler?

Subpart E-Decision Review Board

At page 43598 you reveal "The District Courts are currently remanding more than 50 percent of the disability cases filed against us." Based on this admission of the poor quality of ALJ and Appeals Council work product, you go on to say: "We believe that the important and critical functions pertaining to the review of disability claims currently performed by the Appeals Council can be performed more effectively by a smaller review body..." Of all the bassackwards ways of thinking, this just about takes the cake. Since I have been concentrating on these cases, as of 12/91, we have gone through Re-engineering, Process Unification, Hearing Process Improvement et al. How many more deck chairs will you propose to re-organize? The problems in Federal Court and the Appeals Council WILL NOT be resolved by a "smaller (!) review

body."

If crime in Washington, D.C. were to triple or quadruple, hiring more police to cope with the crime wave would be a/the logical response. We cannot simply complain about throwing money at the problem. When there is more work to be done, more resource is called for. (Hurricane disasters come to mind.) The sooner you adjust to this reality, and give the Appeals Council a whole lot more $ resource, the better off we will all be.

Proposed Rules at p. 43617 regarding the Decision Review Board give us no rights. Only the Decision Review Board has rights. They, not we, can decide if we want to send in comments on bad decisions. And our comments have to be no more than 3 pages and no smaller than 12 point font. It is as if we can only exercise our First Amendment right to petition the government for a redress of grievances if we do not have too many grievances and do not petition very much. This is very convincing of your conversion to government, rather than the people, having the rights. And we are to be reduced to supplicants begging favors. It is more evidence for government of the bureaucrats, by the bureaucrats and for the bureaucrats.

Probably the single greatest hindrance to properly decided cases lies in ALJ methodology. It's the way these decisions are written. You need a whole new way. Here's what to do:

(1) Purchases for every ALJ and AAJ in your agency a copy of: Decision Writing: A Handbook For Administrative Law Judges written by Gus J. Avery, Administrative Law Judge, Maryland Office of Administrative Hearings. This is a short "book" of 50 some pages available from the National Judicial College in Reno, Nevada.

(2) Have two AALs and two staff attorneys take about two weeks (two weeks may become two months) out of their lives to work on a new ALJ decision format, at least in partially

favorable and unfavorable cases that may go up on appeal. They need to start by identifying every mandatory command ("must" "will" "shall" "are required") in the Code of Federal Regulations and the various Social Security Rulings. Then, they need to construct a decisional format around them. All decisions should have two kinds of findings: Findings of Evidentiary Fact and Findings of Ultimate Fact. ALL the elements of Physical and Mental RFC should be addressed, along with all other issues that arise in each case. Not all of these RFC Elements may be disputed. Thus there could be a Ultimate Finding that such and such Mental and such and such Physical RFC elements are not in issue.

(3) In Judge Avery's little book at p. 7, he comments:

> "Some judges reference each finding to a particular exhibit or testimony; *e.g.,* "The Petitioner had $3,000.00 in his bank account (Petitioner's Exhibit #3)," or, "The Appellant was not working on June 12, 1995 (Testimony or Smith, Transcript, p. 35)." This practice has its dangers; if the referenced exhibit or testimony does not actually support the finding, for example, the entire decision will suffer. Nevertheless, there are certain cases where the complexity of the issues justifies this approach. Just be careful!"

Judge Avery is certainly correct that citing evidence that does not exist or say what is claimed for it can be a problem. It is a problem that should simply be accepted. Every finding of <u>ultimate</u> fact that may later be disputed needs to have one or more findings of <u>evidentiary</u> fact in support, and be supported by substantial evidence in the record. And the ALJ needs to explain why certain evidence was accepted and other evidence not accepted.

This, more than anything else you could do, would have the most potential to improve the

quality of decisions and reduce your workload in Federal Court. Your current ALJ decisions just have lots of discussion and a mish-mash of findings. A new format that forces ALJs to take a more methodical subject by subject approach has the most upside potential.

Your proposals should be evaluated in light of this question: How will these changes help the disabled citizens of America? None of them will. They are adopted for a different purpose: To "promote administrative efficiency..." It is as if the ALJ wish list won. A few months ago, at a Hearing before ALJ Linda Haack at Portland, Oregon OHA, ALJ Haack told me that a requirement that we Representatives turn in all evidence, favorable and unfavorable, "will" be in the regulations. Her confidence and smugness were impressive. Sure enough, these proposed rules emerged. The confidence with which this was said suggests the ALJs have been promised they will get these changes. Since we all know that proposed rules and adopted rules are not necessarily the same, this confidence suggested promises have been made.

If the President wishes to make the adjudication process faster for claimants, he can put me in charge with plenary authority over DDS and SSA adjudications. Major improvements for case flow management are certainly achievable.

Please write off these proposed rules as a failure in the tradition of Re-Engineering, Process Unification, HPI et al.

Yours truly,

David B. Lowry Esq.

DBL/cgg

cc: NOSSCR